Supreme Court, U. S.
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80-241

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

KABLE PRINTING COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,
and
LOCAL 91-P, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO,
INTERVENOR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I

QUESTIONS PRESENTED

1. Do Section 10 (e) of the National Labor Relations Act, 29 U.S.C. §160 (e) and this Court's decision in *Universal Camera* v. *NLRB*, 340 U.S. 474 (1951), require that National Labor Relations Board findings in representation decisions be grounded upon substantial evidence based upon the record as a whole; and further, does the substantial evidence standard bar the Board in this case from considering certain evidence to draw inferences therefrom adverse to one party, and then, on equitable grounds, refusing to consider other implications that necessarily flow from that same evidence but which would lead to a result contrary to the Board's holding?

2. Did the National Labor Relations Board and the Court of Appeals err in departing from established case law without justification to hold that striking employees whose jobs have been permanently eliminated in part as a result of new equipment introduced over three years after the beginning of the strike and who have no substantial likelihood of reemployment nonetheless are eligible to vote in a representation election held after such automation was complete?

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LOCAL 91-P, GRAPHIC ARTS
INTERNATIONAL UNION, AFL-CIO,
INTERVENOR.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Kable Printing Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 24, 1980.

[1] All parties to the proceeding in the Court of Appeals are contained in the case caption.

OPINION BELOW

The opinion of the Court of Appeals, an unpublished order, appears in Appendix A hereto. The decision of the National Labor Relations Board in this matter, reported at 243 NLRB No. 167 (1979), also appears in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 24, 1980. A timely petition for rehearing in banc was denied on July 25, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

This case involves Sections 9 (c) (3), 10 (e) and (f) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§159 (c) (3), 160 (e) and (f), the texts of which are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Kable Printing Company ("Kable") operates a commercial printing plant in Mount Morris, Illinois, where it employs members of a variety of printing trades, including some employees engaged in rotogravure operations. (A. 22-23, 62-63).[2] Prior to 1974, Kable performed certain preparatory rotogravure work, including film processing and cylinder engraving, primarily in its own plant. (A. 33-48). This work was performed by employees represented by Local 91-P, Graphic Arts International Union, AFL-CIO ("the Union").

Kable and the Union have had a long history of collective

[2] "A. 22-23" refers to pages 22-23 of Kable's Appendix submitted to the Court of Appeals for the Seventh Circuit in this matter.

bargaining spanning approximately 30 years. The last collective bargaining agreement between Kable and the Union expired on March 31, 1974. (A. 13, 185). On May 10, 1974, in the midst of negotiations for a renewal collective bargaining agreement, and in support of its bargaining demands, the Union struck Kable. (A. 185). All 113 photoengravers represented by the Union ceased work during the strike. (A. 84).

Negotiations continued after the start of the strike. On July 3, 1974 Kable advised the Union that it was considering permanently closing down its preparatory rotogravure operations if a satisfactory collective bargaining agreement could not be reached. (A. 185). This possibility was emphasized again at a July 10, 1974 bargaining session. Finally, after no progress had been made at the July 22, 1974 negotiations meeting, Kable announced that it was permanently terminating its preparatory rotogravure work and that it was willing to bargain with the Union regarding the implementation and effects of the curtailment of its preparatory rotogravure operations. The Union refused to bargain regarding this phase-out of bargaining unit work, even after repeatedly being requested to do so by Kable both at the July 22 meeting and at a meeting on August 5, 1974 called by Kable for that purpose. There were no findings by the Board or any court that Kable acted unlawfully in connection with this elimination of bargaining unit work.[3]

Kable subcontracted its cylinder engraving work and film processing work thereby terminating all of its preparatory rotogravure work (A. 42, 59), and further eliminating the need for any of the 113 former photoengravers, with the

[3] The Union filed charges with the Board alleging that Kable's conduct constituted a refusal to bargain in good faith. These charges were dismissed after investigation. Appeals by the Union to the Board's General Counsel on at least 5 occasions were consistently found to be completely without merit. (A. 131 n.9, 191 n.11, 237 n.7).

limited exception of a small amount of corrective work performed on the purchased cylinders. This corrective work was handled by seven employees hired after the strike began. (A. 20). The equipment previously used by the photoengravers was sold or otherwise disposed of, leaving Kable without the capacity to produce engraved cylinders at Mount Morris. (A. 186).

The Union picketed those shops to which Kable subcontracted its rotogravure work. Kable filed secondary boycott charges that were ultimately dismissed by the Board because the Board found that Kable had not permanently contracted out the preparatory rotogravure work and that the subcontractors were, therefore, allies of Kable, not neutrals who were uninvolved in the labor dispute. The Board's conclusions in some of these secondary boycott cases were ultimately upheld by the United States Court of Appeals for the Seventh Circuit.

In the midst of the secondary boycott cases, and after a hiatus in negotiations of more than one year, the Union requested a resumption of bargaining on September 22, 1975. (A. 12). Kable declined to bargain[4] and filed a petition with the National Labor Relations Board seeking an election to determine whether the Union still represented a majority of employees in the bargaining unit. (A. 12). The description of the bargaining unit in the petition was taken verbatim from the parties' last collective bargaining agreement. (A. 13, 196). Kable stated in the petition that there were approximately seven employees in the bargaining unit, the same number of employees then performing any residual and corrective work on the purchased rotogravure cylinders. (A. 20).

The Union claimed that the bargaining unit included the striking photoengravers, alleging that Kable had never permanently terminated the preparatory rotogravure work.

[4] There was no charge or finding that Kable acted unlawfully by its refusal to bargain in 1975 or in its requesting an election.

The Union alleged that Kable's elimination of this work was a mere bargaining ploy and further asserted that upon the completion of the strike the unit would be restored to its former size. (A. 15-16). Inasmuch as these arguments were related to issues then pending in the secondary boycott cases, the hearing was adjourned indefinitely. (A. 28-29).

After the completion of the secondary boycott cases, the hearing was reopened on December 1, 1976. The record in the representation case was completed on December 3, 1976 and briefs were submitted on January 11, 1977 (A. 2, 120-42).

Nine months later, the Board still had not issued a decision. On October 17, 1977, the Union moved to reopen the record to introduce evidence that *after* the close of the hearing and *after* the filing of briefs, Kable had purchased a new cylinder engraving machine, a Helio-Klischograph. (A. 184). With a crew of only two to three employees, operating on a two shift basis, the highly automated Helio-Klischograph could engrave more cylinders than Kable had produced prior to the strike with its larger complement of employees utilizing the old chemical etching method of manufacture. Kable further projected that no new employees would be required to operate the Helio-Klischograph. (A. 164).

On September 29, 1978, almost three years after the filing of the representation petition, twenty months after the close of the hearing and the filing of briefs, and almost a year after the Union's Motion to Reopen the Record, the Board finally issued its Decision directing an election in the unit described in the petition. (The Board's Decision, reported at 238 NLRB No. 156 (1978), is included in Appendix A hereto.) In that Decision, the Board built inference upon inference, granted the Union's Motion, and admitted the evidence regarding the purchase of the Helio-Klischograph. (A. 184 n.2). Despite the long delays involved in the progress of the case, the Board concluded from the subsequent purchase and installation of the Helio-Klischograph that Kable had never previously intended

to permanently terminate the preparatory rotogravure work. On the basis of this perceived "lack of candor" the Board concluded that Kable was estopped, on equitable grounds, from asserting that the new cylinder engraving equipment extinguished any reasonable expectancy of future employment of the strikers. (A. 191).[5] The Board, thus elected to ignore the fact that as of the date of its Decision none of Kable's striking photoengravers possessed any reasonable likelihood of reemployment. The Board then shifted focus and returned to the situation which existed at the time of hearing in that case when Kable had decided to permanently terminate its preparatory rotogravure operations. While the Board "conceded" that strikers whose jobs have been eliminated for economic reasons forfeit their status for voting purposes under Section 9 (c) (3) of the Act, it held that because Kable's decision to leave the preparatory rotogravure operations occurred after the commencement of the strike, it was not *bona fide* and could not disenfranchise the strikers. (A. 192).

On the foregoing grounds the Board issued a Decision and Direction of Election declaring the strikers eligible to vote. (A. 192). Member Murphy dissented from the Decision and from "the anomalous result obtained herein, where the ghosts of a multitude who have remained outside the employment relationship for more than four years, and are likely to so remain, are allowed to determine the mode of industrial life for the few who live within it." (A. 201).

An election was held on October 27 and 28, 1978 in which seventy voters cast ballots. (A. 209). Only 11 of the voters were actively at work for Kable as of the date of the election. The ballots of the strikers were challenged by Kable. The Regional Director refused to hold a hearing and ordered these

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[5] The Board in its Decision labelled Kable as an "adverse party." This is incomprehensible since representation proceedings under Section 9 of the Act are non-adversary in nature and Kable, at that point, had never been before the Board in the posture of a respondent.

challenges dismissed on the basis that the Board's Direction of Election conclusively decided the eligibility of the strikers. A divided Board affirmed the Regional Director on this point. Prior to overruling the challenges to the strikers' ballots, the tally was 1 for the Union, 4 against, and 65 challenges. (A. 206). After counting the strikers' ballots (and the ballot of one active employee whose challenge was overruled), the tally was 46 for the Union, 5 against, and 19 challenges. (A. 227).

The Board certified these results on March 14, 1979. Kable declined a subsequent Union request to bargain in order to obtain judicial review of the Board's determinations in the representation case. (A. 227, 240). On August 3, 1979, the Board issued a Decision and Order finding that Kable refused to bargain with the Union in violation of Sections 8 (a) (5) and (1) of the Act, 29 U.S.C. §§158 (a) (5) and (1). (A. 239-51). That Board Decision merely granted a Motion for Summary Judgment by the Board's General Counsel and did not review or make additional findings with respect to the validity of the certification or the strikers' likelihood of reemployment.

Kable petitioned the United States Court of Appeals for the Seventh Circuit for review of the Board's Decision and Order. The Board cross-applied for enforcement of its Order and the Union intervened. The Court of Appeals had jurisdiction to hear the matter pursuant to Sections 10 (e) and (f) of the Act, 29 U.S.C. §§160 (e) and (f), the events in question having occurred in Illinois, a state within the Seventh Circuit.

The Court of Appeals, in an unpublished order, denied Kable's petition for review and granted enforcement to the Board's Order in full. With respect to the Board's selective treatment of the evidence regarding the Helio-Klischograph, the Court of Appeals held that the Board's actions were "somewhat questionable" but did not constitute an "abuse of discretion" so improper as to require overturning the Board's findings in this matter.[6] In connection with the issue of

[6] The Court of Appeals did not utilize the substantial evidence standard mandated by Section 10 (e) of the Act and the

the eligibility of the Kable strikers, the Court of Appeals held that the Board's conclusion that the ties of the strikers to Kable remained significant at the time of the election was not, as a matter of law, improper.

Kable petitioned the Court of Appeals for rehearing in banc, but that petition was denied (Swygart and Pell, JJ., dissenting).

In conclusion, Kable respectfully requests that this Court recognize the clear errors of law and the manifest injustices created by the Decision and Order of the Board in this case, grant this Petition for Certiorari, reverse the Decisions below and deny enforcement to the Board's Order.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is In Conflict With Several Controlling Decisions Of This Court.

It is respectfully submitted that for the reasons detailed herein the decision below of the Court of Appeals is in conflict with the decisions of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), as well as *Allied Chemical and Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Certiorari should issue to correct these fundamental and important errors of law contained in the decision below.

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decisions of this Court. The Court of Appeals herein appeared to follow a series of prior Seventh Circuit decisions in which it held that, "In reviewing a Board decision in this [representation proceedings] area the substantial evidence test enunciated in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), has no applicability. Rather, we must defer to the Board's expertise unless we are prepared to say that the discretion residing in the Board was abused." *NLRB* v. *Southern Health Corp.*, 514 F.2d 1121, 1123-24 (7th Cir. 1975); *Follett Corp.* v. *NLRB*, 397 F.2d 91, 95 (7th Cir. 1968). *See also Rockwell Mfg. Co.* v. *NLRB*, 330 F.2d 795, 796-97 (7th Cir.) *cert. denied*, 379 U.S. 890 (1964).

In the underlying representation case, the Board granted a motion by the Union for special permission to introduce evidence establishing that the Company had purchased a new Helio-Klischograph cylinder-making system. The Board relied heavily upon the introduction of this system to support its conclusion that the Company was insincere in a prior statement, made three and one-half years earlier, that it had permanently contracted out and ceased the performance of rotogravure preparatory work. Having admitted the evidence regarding the introduction of the new system, and having further drawn inferences from that evidence which were adverse to Kable, the Board refused on equitable grounds to "permit Kable to use [that] very evidence" to show that the introduction of this equipment extinguished any reasonable expectancy of future employment on the part of the striking employees. (A. 191). The Court of Appeals, while characterizing the Board's actions in this respect as "somewhat questionable," nonetheless affirmed the Board's finding on the basis that the Court did not perceive the Board's conduct to constitute an abuse of discretion.

It is respectfully submitted that the holding below utilizes an improperly narrow standard of review and conflicts with the decision of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).[7] In that case, the Court held that it is incumbent upon the Court of Appeals to evaluate whether a decision of the NLRB is supported by substantial evidence based upon the record as a whole, as is required by §10 (e) of the Act, 29 U.S.C. §160 (e). In an attempt to flesh out the meaning of the substantial evidence standard, the Court stated:

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[7] The Court of Appeals for the Seventh Circuit did not deem this Court's decision in *Universal Camera* applicable to factfinding in representation proceedings. That conflict with the decisions of other Courts of Appeals and this Court is discussed in Section B of this Argument. The portion of Petitioner's argument appearing in Section A herein assumes the applicability of the substantial evidence standard to the decision below.

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contrary evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its own weight.

340 U.S. at 487-88.

It is clear, therefore, that the Board was precluded from relying on the evidence regarding the use of the new cylinder-making system to reach a conclusion adverse to the Employer while simultaneously refusing to consider the fact that such evidence foreclosed any reasonable expectancy of future employment on the part of the striking Kable employees.[8] Further, it is respectfully submitted that even assuming *arguendo* that the Board is empowered in certain circumstances to reject certain facts on the basis of equitable estoppel,[9] it was inappropriate to have done so in this case.

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[8] This case involves more than a review of a simple ruling concerning whether to admit certain evidence in the course of an NLRB proceeding. All the evidence in question was received into the record by the Board. What Kable objected to was the Board's admitted refusal to consider that evidence to the extent it would "disenfranchise the striking employees." (A. 191).

[9] The Board cited no authority for this power, and Counsel is aware of no other Board or Court decision in which the Board attempted to reject certain facts on this basis. The result of the application of equitable estoppel herein is particularly unjust since it requires the new owner of Kable to bargain with the representative of the strikers regarding the working conditions of the replacement employees at work at Kable. The strikers have no interest in the working conditions at Kable or in reaching a new collective bargaining agreement, and the replacement employees are not fairly represented in the bargaining.

This is particularly so, given the conflict of the decision below with the analysis of this Court in *Allied Chemical and Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In that case, the Court held the policy of efficient collective bargaining to require that a functionally distinct group of persons who lack any expectation of further employment should not be permitted to interfere with the substantial and direct mutual interest of active employees regarding wages, hours and other conditions of employment.

> Apart from whether retirees could be considered 'employees' . . . they obviously were not employees 'working' or 'who work' on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return. In any event, retirees could not properly be joined with the active employees in the unit that the Union represents. 'As a standard, the Board must comply . . . with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining' . . . . The Board must also exercise care that the rights of employees under §7 of the Act 'to self-organization . . . [and] to bargain collectively through representatives of their own choosing' are duly respected. In line with these standards, the Board regards as its primary concern in resolving unit issues 'to group together only employees who have substantial mutual interest in wages, hours and other conditions of employment.' Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit.

404 U.S. at 171-73.

The policy of *Pittsburgh Plate Glass* applies with equal vigor to the situation in *Kable* where the strikers have no substantial likelihood of reemployment. The Union therefore represents and is controlled by a group with interests separate and distinct from those of the replacement employees who are actively at work at the Company. The Supreme Court observed in *Pittsburgh Plate Glass* that, "No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased to work without expectation of further employment has been held to be an 'employee.' " *Id.* at 168.

The decision herein represents the first case in which strikers who have been permanently automated out of their jobs, and who have no expectation of further employment, have been held to retain their status as employees and eligible voters under the Act.

B. The Decision Below Is In Conflict With Other Courts Of Appeals Decisions.

The Court of Appeals for the Seventh Circuit has consistently held that the substantial evidence standard enunciated in this Court's decision in *Universal Camera* v. *NLRB*, *supra*, and contained in Section 10 (e) of the Act, 29 U.S.C. §160 (e) does not apply to fact finding in representation proceedings. *See* cases cited in n.6 *infra*. The Seventh Circuit instead scrutinizes Board decisions in light of the much more limited "abuse of discretion" standard. The Seventh Circuit's decisions, including the decision below, conflicts with the decisions of other Courts of Appeals which do utilize the substantial evidence standard to review Board representation proceedings. *See e.g. Retail Clerks, Local 428* v. *NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975); *NLRB* v. *Commercial Letter, Inc.*, 496 F.2d 35, 37 (8th Cir. 1974); *NLRB* v. *Texas*

Industries, 426 F.2d 813 (5th Cir. 1970); *NLRB* v. *Jesse Jones Sausage Co.*, 307 F.2d 664, 666 (4th Cir. 1962). *But see Kustom Electronics, Inc.* v. *NLRB*, 590 F.2d 817, 822 (10th Cir. 1978); *Amalgamated Clothing Workers of America* v. *NLRB*, 424 F.2d 818, 827, 131 U.S. App. D.C. 330 (D.C. Cir. 1970); *NLRB* v. *Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *Pepperell Mfg. Co.* v. *NLRB*, 403 F.2d 520, 522-23 (5th Cir. 1968), *cert. denied*, 395 U.S. 922 (1969) (Courts utilizing the abuse of discretion standard to review fact finding in Board representation cases).[10]

Petitioner contends that the substantial evidence test clearly is the only appropriate standard for judicial review of the Board proceedings below.[11] The application by the Court of Appeals for the Seventh Circuit of an impermissibly narrow standard of review deprived Kable of meaningful judicial review of the Board's decision herein. It is therefore respectfully submitted that this Court should grant certiorari to eliminate the above cited conflict in the Circuits and resolve this important and recurring question of federal labor law.

The abuse of discretion standard also conflicts with the

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[10] The above recitation of conflicting decisions by the various Courts of Appeals is intended to be representative rather than exhaustive.

[11] Petitioner believes that Section 10 (e) of the Act, 29 U.S.C. §160 (e) requires the application of the substantial evidence standard herein since this case is a refusal to bargain proceeding and, therefore, an unfair labor practice case. The above cited cases all occurred in the context of courts reviewing Board orders in refusal to bargain unfair labor practice cases. There is no other procedure available for securing judicial review of NLRB decisions in representation proceedings. Additionally, however, Petitioner believes the Act contemplated that there be a single standard of judicial review applicable to all Board findings of fact whether made in the context of an unfair labor practice proceeding or a representation proceeding. *Cf. Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 142-43 nn. 9-12 (1971), and accompanying text.

holding in *Choc-Ola Bottlers, Inc.* v. *NLRB*, 478 F.2d 461 (7th Cir. 1973), that a discharged employee was not entitled to vote. The decision in *Choc-Ola Bottlers* rested upon this Court's decision in *Pittsburgh Plate Glass, supra*. The Court of Appeals in *Choc-Ola* reasoned that inasmuch as the discharged employee had ceased work, without expectation of further employment, he was not entitled to have any voice in determining the representation rights of his twelve former colleagues. In further support of its conclusion, the Court noted that, "It is apparent that the discharged employee's vote will be directed more toward a result that seems to him in the employer's worst interest than to one in his former colleagues' best interests." 478 F.2d at 464.

The divergence of interests between the Kable strikers and Kable's active employees is even greater than that which existed in *Choc-Ola Bottlers* and of far more overwhelming impact. In the case at bar, the Kable strikers have been on strike for over six years. The active employee complement consists exclusively of employees who were hired as replacements for the strikers and who daily crossed the picket line established by the Kable strikers. Thus, the votes of the Kable strikers were obviously not in sympathy with the best interests of the replacement employees, and surely, after such a bitter struggle, must have been directed instead toward a result that seems to them in the worst interest of Kable and the replacement employees (who are hopelessly outnumbered by the strikers).

It is also submitted that the decision of the Court of Appeals below is in direct conflict with *Duncan Foundry & Machine Works, Inc.* v. *NLRB*, 458 F.2d 933 (7th Cir. 1972) (opinion by then Circuit Judge Stevens). In *Duncan Foundry*, the Court of Appeals recognized that:

> *The Board has held that where elimination or consolidation of jobs due to streamlining of operations occurs*

> *with no additions to the present working force contemplated, there is a complete elimination of the job rendering the striking employees who no longer have jobs ineligible.* Similarly, where an employer no longer has the means of providing the jobs which were formerly filled by strikers because of the sale of machinery or subcontracting of work, and the Employer does not anticipate increasing the work force in the foreseeable future, former strikers not recalled have been found to be ineligible.
>
> In the instant case, however, the Employer's evidence does not support a conclusion that the jobs of strikers have been permanently eliminated . . . . There has been no fundamental change in the Employer's operations, no cessation of any segment of its business activities, no sale of equipment and no subcontracting of its functions. *The Employer still retains the capacity to accommodate pre-strike levels of* production and *employment,* which distinguishes the instant case from those described above.

Id. at 937 (emphasis added). The Court in *Duncan* went on to note that, "The decision on the challenges must be based on the evidence and probabilities at the time of the election." *Id.* at 937 n.10. *See also Kustom Electronics, Inc.* v. *NLRB*, 590 F.2d 817, 820 (10th Cir. 1978) (Court using likelihood of reemployment on day of the election to ascertain voter eligibility); *NLRB* v. *Jesse Jones Sausage Co.*, 309 F.2d 664, 666 (4th Cir. 1962) (same).

In its Decision, the Board focused exclusively upon the veracity and good faith of Kable's claim that in 1974 it had permanently subcontracted its rotogravure preparatory operations and that it had permanently terminated that segment of its printing operations. But under the "day of the election" standard utilized by the Tenth and Fourth Circuits and by the Seventh Circuit panel in *Duncan*, it was clear error for

the Board to have ignored the impact of the Helio-Klischograph cylinder-making system upon the probability of reemployment of the strikers. Although the Court of Appeals in *Kable* referred to that standard in its opinion, it is respectfully submitted that the Court of Appeals erred in not requiring the Board to use a similar focus.

C. The Decision Departs From A Series Of Long-standing NLRB Decisions Without Justification.

While the decisions of the Board are entitled to deference based on the expertise of the agency, the Courts have recognized that the foundation for such deference is undercut somewhat when the expert agency departs from its own prior holdings and decisions without explanation. *See e.g. Seafarers, Local 777* v. *NLRB*, 603 F.2d 862 (D.C. Cir. 1979). The Board's decision in this case represents the first time that it has ruled that strikers whose jobs were eliminated as a result of automation and who lacked a substantial likelihood of recall in the foreseeable future were nonetheless eligible to vote in a representation election. In all prior reported NLRB decisions in this area the Board has held that strikers whose jobs no longer existed as a result of automation lacked sufficient community of interest with other unit employees and were thus not eligible to participate in representation elections. *See Hawaii Press Newspapers, Inc.*, 154 NLRB 99 (1965) (Board holding composing room employees ineligible to vote "by virtue of the permanent replacement of strikers and the lapse of more than one year's time, and the partial elimination of unit jobs."); *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677 (1960) ("Although it is a question to be determined on the basis of the facts and circumstances of each case, generally, an economic striker forfeits such status, for voting purposes, where prior to the election . . . the employer eliminates his job for economic reasons."); *Meridian Plastics, Inc.*, 108 NLRB 203, 205-06

(1954) ("The record shows further that the company has sold or leased indefinitely one of the machines that operated at the time the strike started, eliminating the jobs formerly filled by strikers; that after the strike started, the company subcontracted its packing operations and will continue to do so in the future, eliminating another thirteen jobs; and that the company does not anticipate increasing its work force in the foreseeable future. Thus, it is clear that the former strikers not recalled, have been permanently replaced or that their jobs have been abolished. Accordingly, we find that the former strikers who have not been reemployed are not entitled to reinstatement and are ineligible to vote in the election."); *E.J. Kelley Company*, 98 NLRB 486 (1952) (Board holding strikers ineligible where jobs have been eliminated for efficiency reasons and as a consequence the employer did not contemplate additions to its present work force whether or not the strike terminated.). *See also Globe Molded Plastics Company, Inc.*, 200 NLRB 377, 378 (1972), affirming the rule set forth in *Meridian Plastics* and *E.J. Kelley, supra.*

Shortly after the issuance of the instant decision, the Court of Appeals for the Seventh Circuit in a panel decision (Peck, Pell and Wood, JJ.) held that it was unfair to grant enforcement to an NLRB decision where the Board failed to act consistently with clearcut standards set forth in its prior decisions. *Midwest Stock Exchange* v. *NLRB*, 620 F.2d 629 (7th Cir. 1980). "Where the Board has promulgated standards . . . those standards are controlling until the Board announces a change and its reason for the change. Until such a change is announced, the Board's application of its standards must be reasonably consistent with its prior decisions. *Id.* at 633. It is respectfully submitted that the Board's unexplained departure in *Kable* from all its own prior decisions and from controlling precedent of the Supreme Court and Courts of Appeals for the Fourth, Seventh and Tenth Circuits, should render the Board's decision unenforceable under the *Midwest Stock Exchange* standard. In light of the importance of the

questions presented and their likely repetition, this Court is respectfully requested to grant certiorari and resolve these issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

IRA F. JAFFE
MORRIS L. DEUTSCH
99 High Street
Boston, Massachusetts 02110
Counsel for Petitioner

DEUTSCH, WEINTRAUB & GLAZERMAN, P.C.
of Counsel
August 15, 1980

APPENDIX A

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604
Argued: February 25, 1980

Before
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. NICHOLAS J. BUA, *District Judge**

No. 79-1891

KABLE PRINTING COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

and

LOCAL 91-P, GRAPHIC ARTS
INTERNATIONAL UNION, AFL-CIO,
INTERVENOR.

ON PETITION TO REVIEW AND CROSS-APPLICATION TO ENFORCE
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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*District Judge Nicholas J. Bua of the Northern District of Illinois is sitting by designation.

ORDER

The present matter involves the contention of the petitioner, the Kable Printing Company [Kable], that a finding made by the National Labor Relations Board [the Board] when entering summary judgment against it (Kable) and in favor of the intervenor, Local 91-P of the Graphic Arts International Union, AFL-CIO [the Union], that Kable violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Union after it had been certified by the Board as the exclusive bargaining representative of a unit of Kable employees, is both erroneous and invalid. Kable concedes that it has refused the Union's requests to bargain, but claims that it did so solely to preserve its ability to obtain judicial review of the Board's action in certifying the Union. The petitioner maintains that said certification is invalid and contrary to law because it was based upon the results of an election in which the Board improperly extended voting eligibility to a number of striking Kable employees whose jobs, in the petitioner's view, had been permanently abolished prior to the election through changes in Kable's methods of operation and/or through the introduction of new, fully automated equipment. Kable accordingly seeks in this appeal to have the Board's certification of the Union declared invalid, and to have overturned the judgment entered against it on the Union's subsequent unfair labor practice claim.

In support of its contention, Kable argues initially that the Board, in refusing on equitable grounds to allow Kable to present certain evidence related to the purported elimination of the strikers' jobs, acted improperly. As regards this argument, the court first notes that when making determinations of this nature, the Board must be accorded wide discretion. *See generally NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). We nonetheless feel, after reviewing the memoranda and various other materials submitted by the parties, that the Board's actions in this respect were somewhat questionable. It is

our belief, however, that the evidentiary ruling complained of was not so improper as to constitute an abuse of discretion which would warrant overturning the Board's findings in this matter. To the contrary, we are of the opinion that the evidence in question was not, when viewed in conjunction with the other evidence presented, of such significance as to reasonably increase the likelihood that a different result would have been reached.

Kable secondarily contends that the Board's findings regarding the strikers' eligibility to vote in the representation election at issue were not supported by substantial evidence. We find this argument, however, also to be without merit. With respect to this contention of the petitioner, it again must be noted at the outset that the National Labor Relations Act confers upon the Board broad discretion. Such discretion, moreover, clearly extends to the Board's ability to administer representation elections — including its authority to determine the scope of the employee unit and to rule upon issues of voting eligibility. *NLRB* v. *A. J. Tower Co., supra* at 330; *NLRB* v. *Sun Drug Co.*, 359 F.2d 408, 413-14 (3d Cir. 1966); *NLRB* v. *J. J. Collins' Sons, Inc.*, 332 F.2d 523, 525 (7th Cir. 1964).

As a rule, eligibility to vote in a representation election "is tested by determining whether the employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the election of its bargaining agent." *NLRB* v. *Certified Testing Laboratories, Inc.*, 387 F.2d 275, 277 (3d Cir. 1967). Absent some clear showing that their ties to the employee unit have been cut, striking employees normally will meet that test.[1] From the materials submitted by the

[1] Under Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), strikers retain their status as employees until they secure regular and substantially equivalent employment elsewhere. *See NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 104 (7th Cir. 1969). Although elimination of strikers' jobs may defeat their reinstatement, and accordingly their voting rights, the burden is on the party challenging those rights to establish that the strikers' jobs have been eliminated "for substantial and bona fide reasons other than considerations relating to labor relations." *NLRB* v. *Fleetwood Trailer Co., supra* at 379.

parties, it is clear that the Board had ample evidence before it to allow for the conclusion that the ties of the Kable strikers to the petitioner's working employees remained significant at the time of the election in question. The Board's decision to allow them to participate in said election thus cannot, as a matter of law, be considered improper.

For the reasons stated above, the Kable Printing Company's petition for review is DENIED. It is further directed that the order of the National Labor Relations Board be ENFORCED in full.

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604
July 25, 1980.

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. NICHOLAS J. BUA, *District Judge**

No. 79-1891

KABLE PRINTING COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

and

LOCAL 91-P, GRAPHIC ARTS
INTERNATIONAL UNION, AFL-CIO,
INTERVENOR.

ON PETITION TO REVIEW AND CROSS-APPLICATION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by petitioner, a vote of the active members of the Court was requested, and a majority of the active members of the Court

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*District Judge Nicholas J. Bua of the Northern District of Illinois is sitting by designation.

have voted to deny a rehearing *in banc*.** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Judges Swygert and Pell voted to grant rehearing *in banc*.

FPM

243 NLRB No. 167

D—5374
Mount Morris, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KABLE PRINTING COMPANY,
A WHOLLY OWNED SUBSIDIARY OF
WESTERN PUBLISHING COMPANY, INC.[1]

and Case 33-CA-4225

LOCAL 91-P, GRAPHIC ARTS
INTERNATIONAL UNION, AFL—CIO

DECISION AND ORDER

Upon a charge filed on April 11, 1979, by Local 91-P, Graphic Arts International Union, AFL-CIO, herein called the Union, and duly served on Kable Printing Company, a wholly owned subsidiary of Western Publishing Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 33, issued a complaint on April 13, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

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[1] All prior cases named Respondent as Kable Printing Company.

With respect to the unfair labor practices, the complaint alleges in substance that on March 14, 1979, following a Board election in Case 33—RM—118,[2] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[3] and that, commencing on or about March 16, 1979, and at all times thereafter, and particularly by letter dated March 27, 1979, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 19, 1979, Respondent filed its answer to the complaint admitting in part and denying in part, the allegations in the complaint.

On May 9, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 22, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[2] On August 1, 1978, the General Counsel of the National Labor Relations Board transferred this case from the former Subregion 38 to its newly created Region 33 and changed its case number from 38—RM—118 to 33—RM—118.

[3] Official notice is taken of the record in the representation proceeding, Case 33—RM—118, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits that it has refused to bargain as alleged but attacks the Union's certification on the ground that it is based upon a revised tally of ballots which improperly included a determinative number of votes cast by former employees of Respondent whose jobs had been permanently abolished by changes in Respondent's operating procedure and by the introduction of new and automated equipment which eliminated any reasonable prospect of their reemployment in the unit in the foreseeable future. Counsel for the General Counsel argues that there are no matters warranting a hearing because the issues concerning the Union's certification were litigated and determined in the representation case. We agree with the General Counsel.

A review of the record herein, including the record in Case 33—RM—118, indicates that upon a petition duly filed under Section 9(c) of the Act a hearing was held before Hearing Officer Ira S. Epstein. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the case was transferred to the Board for decision. On September 29, 1978, the Board (Member Murphy dissenting) issued a Decision and Direction of Election in the unit found appropriate.[4] In its Decision, the Board found that the jobs of the approximately 113 economic strikers involved in the case had not been permanently abolished and the strikers remained employees for the purpose of voting in the directed election. In so deciding, the Board refused to allow Respondent to use evidence, previously withheld by Respondent, to disenfranchise the striking employees by asserting that its new cylinder-

[4] 238 NLRB No. 156.

engraving system extinguished any reasonable expectancy of future employment for those employees. On October 27 and 28, 1978, pursuant to the Board's direction, an election by secret ballot was conducted under the supervision of the Regional Director for Region 33. The tally of ballots showed 1 for and 4 against the Union; there were 65 challenged ballots, a sufficient number to affect the results. No objections to the conduct of the election or to the conduct affecting the results of the election were timely filed by the parties. On December 1, 1978, the Regional Director issued a Report on Challenged Ballots, wherein he recommended that Respondent's challenges to the ballots of 45 striking employees be overruled,[5] finding that these employees were among the 113 strikers which the Board found to be eligible voters in its Decision and Direction of Election, and that the arguments raised by Respondent's challenges to the ballots of these employees had been considered by the Board in its Decision. The Regional Director further recommended that a hearing be held to resolve the issues raised by the challenges to 7 ballots of striking employees and 11 ballots of nonstriking employees in the event the revised tally of ballots showed that these ballots were determinative. Respondent filed timely exceptions to the Regional Director's report, contending that its challenges to the ballots of 52 striking employees should be sustained or, in the alternative, a hearing should be held to determine whether, in view of Respondent's changes in methods of operation, any of those strikers had a reasonable expectancy of reemployment in the unit at the time of the election. In this connection, Respondent argued that the Regional Director incorrectly determined that the Board, in its preelection Decision, foreclosed consideration, at the postelection stage of the case, of evidence regarding Respondent's cylinder-engraving system. On February 27, 1979, the Board (Member Murphy dissenting in part) issued a Decision and Direction,[6]

[5] The Regional Director also recommended that the challenged ballot of a nonstriking employee be overruled.

[6] Not reported in bound volumes of Board Decisions.

adopting the Regional Director's findings and recommendations. On March 8, 1979, those ballots, the challenges to which were overruled, were opened and counted, and a revised tally of ballots was issued showing 46 for, and 5 against, the Union; there were 18 nondeterminative challenged ballots, a number insufficient to affect the results. On March 14, 1979, the Regional Director issued a Certification of Representative.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[7]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is an Illinois corporation with its office and place of business located at Mt. Morris, Illinois, where it is engaged in the business of printing magazines, catalogues, and other

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[7] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

related items. During the preceding 12 months, Respondent sold and shipped from its Mt. Morris, Illinois, facility, products valued in excess of $50,000 to points outside the State of Illinois, and received goods and materials valued in excess of $50,000 from points outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 91—P, Graphic Arts International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees performing any of the following work: all work, processes, operations and productions directly related to lithography, offset (including dry or wet), photoengraving, intaglio, and gravure methods of printing (excluding production presswork) employed by the Employer at its plant located at 404 N. Wesley Avenue, Mt. Morris, Illinois; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

2. The certification

On October 27 and 28, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 33, designated the Union as their representative for the purpose of

collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on March 14, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 16, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 16, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since March 16, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the

Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Kable Printing Company, a wholly owned subsidiary of Western Publishing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 91—P, Graphic Arts International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees performing any of the following work: all work, processes, operations and productions directly related to lithography, offset (including dry or wet), photoengraving, intaglio, and gravure methods of printing (excluding production presswork) employed by the Employer at its plant located at 404 N. Wesley Avenue, Mt. Morris, Illinois; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 14, 1979, the above-named labor organization has been and now is the certified and exclusive represen-

tative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 16, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Kable Printing Company, a wholly owned subsidiary of Western Publishing Company, Inc., Mt. Morris, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 91—P, Graphic Arts International Union, AFL—CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees performing any of the following work: all work, processes, operations and productions directly related to lithography, offset (including dry or wet), photoengraving, intaglio, and gravure methods of printing (excluding production presswork) employed by the Employer at its plant located at 404 N. Wesley Avenue,

Mt. Morris, Illinois; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant located at Mt. Morris, Illinois, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 33, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 3, 1979

JOHN H. FANNING *Chairman*
JOHN A. PENELLO *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[8] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

MEMBER MURPHY, dissenting:

I decline to take the final step on the path followed by my colleagues which, as I predicted, has led to a predictable and totally unsupportable result.

In the underlying representation case herein, I did not join my colleagues in the adoption of the Regional Director's recommendation that the challenges to the ballots of 45 of the strikers be overruled and counted, and that a hearing be held to resolve the issues raised by the challenges to the ballots of 7 strikers in the event they remained determinative. Instead, I would have sustained the challenges to the ballots of these 52 strikers, *inter alia*, and would have issued a certification of results of election based upon the valid votes cast. Therefore, I would deny the General Counsel's Motion for Summary Judgment here. My colleagues' decision to the contrary permits, as I feared, the ghosts of a multitude who have remained outside the employment relationship for more than 4 years, and are likely to so remain, to determine the mode of industrial life for the few who live within it. See *Kable Printing Company*, 238 NLRB No. 156 (1978).

Dated, Washington, D.C. August 3, 1979.

BETTY SOUTHARD MURPHY, *Member*
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 91—P, Graphic Arts International Union, AFL—CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees performing any of the following work: all work, processes, operations and productions directly related to lithography, offset (including dry or wet), photoengraving, intaglio, and gravure methods of printing (excluding production presswork) employed by the Employer at its plant located at 404 N. Wesley Avenue, Mt. Morris, Illinois; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

KABLE PRINTING COMPANY,
A WHOLLY OWNED SUBSIDIARY OF
WESTERN PUBLISHING COMPANY, INC.

(Employer)

Dated _____ By _____

(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower, 16th Floor, 411 Hamilton Avenue, Peoria, Illinois 61602, Telephone 309-671-7081.

FPM

238 NLRB No. 156

D—4193
Mount Morris, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KABLE PRINTING COMPANY,
EMPLOYER-PETITIONER

and

Case 38-RM-118

LOCAL 91—P GRAPHIC ARTS
INTERNATIONAL UNION, AFL—CIO,
UNION

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Ira S. Epstein. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred to the Board for decision. The Employer and the Union filed briefs. Thereafter, the Union filed a motion for special permission to introduce new evidence and to dismiss the petition or, in the alternative, to reopen the hearing, and the Employer filed a responding brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. Kable Printing Company, the Employer herein, is a major printing house with facilities at Mount Morris, Illinois, where it prints magazines, catalogs, and related items for publishers, large merchandisers, and other businesses located throughout the country. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act.

2. Local 91 — P is a labor organization, with the meaning of the Act, which claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9 (c) (1) and 2 (6) and (7) of the Act.

The Employer questions the majority status of the Union on the grounds that the latter has engaged in an economic strike for more than one year and that the approximately 113 strikers have either been permanently replaced or their jobs have been permanently abolished. Specifically, in its brief in support of the petition, the Employer contends that it has discontinued the production of rotogravure cylinders for use on its presses and has no intention of reverting to its former practice of producing them. The Employer also asserts that it sold most of the equipment necessary to produce these cylinders, thus losing the capacity to do so, and that it has entered into long term contracts with outside suppliers to furnish such cylinders as are required. Based on these contentions, the Employer avers that its present employee complement of approximately seven individuals is sufficient for its anticipated business needs and that no striker has a reasonable expectation of any further employment.

In its initial brief, the Union contends that there is no valid reason for questioning its continued majority status and accordingly that the petition filed herein should be dismissed. In the alternative, it argues that, should the Board hold otherwise and direct an election, all unreplaced economic strikers should be entitled to vote therein. In support of these contentions, the Union alleges, as it had ofttimes in the past,[1] that Kable's announced decision to discontinue permanently the production of rotogravure cylinders was a bargaining stratagem designed to force capitulation by the Union in the labor dispute which followed a breakdown in contract negotiations between the parties. Therefore, the Union argues, Kable can be expected to resume the production of rotogravure cylinders upon termination of the strike. Likewise, the Union argues that, as Kable's announced decision to subcontract the disputed work has no economic component independent of the strike, resumption of such work is likely and, accordingly, the unreplaced strikers do have a reasonable expectation of further employment. In this respect, the Union asserts that the substantial size and weight of the cylinders, which during the correction process must be moved many times over great distances between Kable's pressroom and the subcontractors' rotogravure preparatory areas, result in an inefficiency which can be remedied only by Kable itself performing the rotogravure preparatory work currently in the hands of the subcontractors.

More recently, in its brief in support of its motion, the Union asserts, *inter alia*, that it is in possession of new evidence which shows that Kable never intended to discontinue permanently its rotogravure preparatory operations and, indeed, has continued to plan for the purchase of new, more sophisticated cylinder-producing equipment at the same time it represented to the Board and the General Counsel that it had no intention of resuming this bargaining unit work.[2]

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[1] See fn. 5, *infra*.

[2] The Union's motion for special permission to introduce new evidence, in the form of exhibits attached thereto, is hereby

In its responding brief, Kable contends that its decision to institute the operational changes cited by the Union was made only recently, and only after the Company had adhered to its initial decision (i.e., permanently to subcontract the work) for nearly 3-½ years after that decision was announced. The Employer also contends that the proffered evidence does not show that when company representatives announced the discontinuation of rotogravure preparatory operations in July 1974, they did so falsely or in bad faith. Further, Kable argues that, with the installation of the new automated equipment, the old chemical engraving process will be replaced by a computerized electronic engraving process which substantially reduces the need for the number of unit employees formerly required. Therefore, Kable contends that the jobs of the striking employees have been permanently abolished, initially through subcontracting arrangements and now "altogether by automation." Accordingly, Kable argues that installation of the new equipment extinguishes any expectation of future employment on the part of striking employees "more permanently than ever."

I

On the facts and for the reasons hereinafter set forth, we shall direct than an election be held in this case.

For many years, the union bargained with the Employer on behalf of employees engaged in rotogravure preparatory work in the unit hereinafter found appropriate. The last contract between the parties expired on March 31, 1974. They were unable to reach agreement on the terms of a new contract and on May 10 the Union struck. Thereafter, the Employer made arrangements to have the struck rotogravure preparatory work performed by "front-end" shops in order to maintain production of the rotogravure cylinders necessary for Kable's

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granted. Although Kable argues against the probative value of the aforesaid exhibits, no objection is raised with respect to their being made a part of the record herein.

presses. These efforts generally proved unsuccessful, as the Union and other affiliated locals were able to follow the "struck work," effectively interfering with the performance of such work by the front-end shops which had allied themselves with Kable in the latter's dispute with the Union.[3]

Thus, on July 3, 1974, Kable advised the Union for the first time, after subsequent bargaining sessions failed to bring the parties closer to agreement, that the company was considering shutting down permanently the rotogravure preparatory portion of its business if the Union did not call off the strike. This warning was repeated at a bargaining session held on July 10, but to no avail. The parties made no progress at the next meeting, which was held on July 22. In the course of that meeting, Kable's bargaining representatives caucused, and a decision was made to announce the termination of the rotogravure preparatory operations. An announcement to that effect was made to the union representatives, when the meeting resumed, by Kable's chief negotiator, who stated that the company would begin phasing out certain operations immediately but offered to bargain on the effects of termination.

The parties met again on August 5, at Kable's request, to discuss the effects of the phase out. On that occasion, the company also asked union representatives for any new substantive proposals. At a bargaining session held the next day, the Union presented and explained their new substantive proposals, which the company rejected after a 1-hour caucus as "too little too late."

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[3] The following cases provide background on this aspect of the far-ranging dispute between Kable and the Union: *Mount Morris Graphic Arts International Union Local No. 91—P (G.A.I.U.) (Blackhawk Engraving Co.)*, 219 NLRB 1030 (1975), affd. *sub nom. Blackhawk Engraving Co.* v. *N.L.R.B.*, 540 F.2d 1296 (C.A. 7, 1976). *Graphic Arts International Union (G.A.I.U.) Local No. 277; and Graphic Arts International Union, AFL-CIO (S&M Rotogravure Services, Inc.)*, 219 NLRB 1053 (1975), and *Local No. 245, Graphic Arts International Union, AFL-CIO (Graphicscans Corporation)*, 220 NLRB 407 (1975), both cases affd. *sub nom. Kable Printing Co.* v. *N.L.R.B.*, 540 F.2d 1304 (C.A. 7, 1976).

Meanwhile, the company began to implement its announced decision by contracting directly with several front-end shops for the performance of rotogravure preparatory work required in connection with customer contracts, albeit with some difficulty, according to some company officials, because of the effectiveness of the Union's countermeasures. Kable also began disposing of much of its rotogravure preparatory equipment. By the end of January 1975, it had lost its capacity to produce film positives as well as each cylinder size required by its customers.[4]

As matters thus stood, the Board again had occasion, in *S & M II*,[5] to determine whether the various subcontractors performing rotogravure preparatory work were likewise allies of Kable in the latter's dispute with the Union. We so held, rejecting the contention that Kable had permanently and irrevocably discontinued the rotogravure preparatory portion of its business thereby converting the continuing controversy between Kable and the Union herein to one no longer involving "struck work" — namely, work which, but for the strike, would have been performed by Kable's striking employees. By doing so, we rejected the notion that those employees had no expectation of returning to the work involved in that controversy. Specifically, the Board observed:

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[4] We do not view Kable's disposal of a substantial amount of its rotogravure preparatory equipment as substantial evidence of its intent to liquidate permanently that portion of its business. Indeed, one aspect of the labor dispute between the parties concerned manning requirements which, in the company's view, discouraged the introduction of new, more technically advanced equipment, consistent with its declared objective announced by Western Publishing Corporation, the parent company, in its 1974 third quarter report: "We desired to expand this facility [Kable Printing], *to install new equipment* and to move into new fields of activity but these could not be accomplished without a major revision of the existing labor contracts." [Emphasis supplied.]

[5] *Graphic Arts International Union, AFL-CIO; and Local # 277, Graphic Arts International Union, AFL-CIO (S & M Rotogravure Service, Inc.)*, 225 NLRB 1253 (1976) (then Chairman Murphy, dissenting), affd. *sub nom. Kable Printing Company* v. *N.L.R.B.*, 545 F.2d 1079 (C.A. 7, 1976).

Kable concedes that it continues to perform and has maintained the capacity to perform much of the work here in question. However, it attributes its unactualized intent to transfer permanently all of the controversial rotogravure preparatory operations to subcontractors and the performance of residual preparatory work as being caused by the effectiveness of the Unions' countermoves which necessitates retention of a limited production capacity. It asserts that the short duration of its agreements with subcontractors and the lack of specificity are occasioned by the absence of those contractors' proven ability, which also explains the "high profile" of Kable's so-called quality control personnel who were engaged to oversee the work of the subcontractors. The continued chroming and stripping of cylinders at Kable's facility and the marking up of proofs, which was previously done by Kable's striking employees, were explained for the most part as necessitated by a lack of subcontractor capability.

Accepting the foregoing assertions and explanations, we are satisfied that Kable has not gone out of the business of furnishing finished rotogravure work to its customers. Significant in our view is the fact that, throughout this controversy, Kable has maintained in all its essential characteristics the same relationships with its customers as it had previously, under contractual arrangements which establish Kable as the sole producer of its customers' printed materials. In the beginning, Kable authored arrangements, nominally between its customers and front-end shops, in an attempt to have the struck work performed without drawing those shops into the controversy as allies of Kable. Those efforts proved unsuccessful. Thereafter, Kable dealt directly with the front-end shops as subcontractors, while maintaining the traditional form and content of its contracts with customers. These contracts call for the production of finished materials, and encompass all phases of the work

entailed in the production of same, including the rotogravure preparatory work, printing, binding, and distribution. Clearly, by so contracting, Kable assumes liability for any failure in contract performance. It can hardly be said in such circumstances that Kable, which continues to contract for the performance of rotogravure preparatory work with customers seeking this service and stands ready to assume the risks attendant upon failure to perform such contracts, has hired additional engravers for quality control purposes, and continues to chrome and strip cylinders and to mark up proofs, has permanently gone out of the rotogravure preparatory portion of its business. It still sells and furnishes rotogravure services and products to its customers. The fact that it has determined to subcontract all or substantially [all] of the rotogravure production work does not alter the fact that it is the work of the striking employees that has been contracted out. The fact that the decision to do so, and to do so on a permanent basis, was a good-faith business decision necessitated in part or in whole as a response to conditions growing out of the Unions' strike in support of their refusal to accept Kable's bargaining proposals concerning terms and conditions under which such work would be performed by Kable's employees, can hardly take it out of the category of struck work, at least during the time the labor dispute between Kable and Respondents continues [footnotes omitted].[6]

Since our supplemental decision in *S & M II*, certain additional facts have come to light. The record herein reveals that Kable sold or otherwise removed most of its rotogravure preparatory equipment and, as a result, does not have the capacity to produce engraved cylinders at its own plant. It also entered into long term contracts with front-end shops which establish minimum production

[6] 225 NLRB 1253, 1254.

levels and contain provisions for liquidated damages. However, Kable continues to employ individuals who perform some of the work which was done previously by the 113 striking employees, relating to the inspection and maintenance of cylinders. This work includes chroming, dechroming, lacquering, dallicking (spot electroplating to erase images from small areas), sanding and rubbing to remove scratches, plating and grinding, and some handtooling, staging and spot reetching. Moreover, Kable continues to solicit customers and enters into contracts with them for the performance of services encompassing the entire rotogravure process, including film work, cylinder engraving, correction, printing, and binding.

More recently, additional facts have been brought to light. The record now shows that on February 1, 1977, George Kaplan, vice president (manufacturing services) of Western Publishing Corporation, the parent company, directed a memorandum to Howard Anderson, Western's treasurer, requesting an appropriation of funds in excess of $1,200,000 for the purchase of a Helio-Klischograph cylinder-making system. According to Kaplan, the increased capacity of this system, as compared with the system formerly used by Kable, would bring cylinder production up to Kable's anticipated press capacity, which was concededly measured by including a new Motter press which had been ordered for Kable almost 1 year before contract negotiations between Kable and the Union foundered. Kaplan estimated production start-up time to be 8-½ months from the date of purchase. Significantly, Kaplan's request was made only 3 weeks after Kable filed with this Board its brief in support of the instant petition, in which it represented unequivocally, as it had since *S & M II*,[7] that a decision had been reached to discontinue rotogravure preparatory operations permanently, including cylinder making.

Indeed, funds for the purchase of this system were

[7] See fn. 5, *supra*.

authorized and on April 4, 1977, Western announced its acquisition, although stating that no decision had yet been made as to its intended location.[8] In the announcement, Gerald J. Slade, Western's chairman and president, is quoted as stating that the Helio-Klischograph, representing the very latest in graphic arts technology,

> . . . plus Kable's extensive printing capacity, will enable Western's Commercial Products sales force to pursue new business since they will *now* be in an excellent position to assure present and prospective rotogravure printing customers that Western can supply all their cylinder-printing needs regardless of time requirements. [Emphasis supplied.]

Slade also noted that:

> The addition of this new equipment will enhance considerably Western's already highly-diversified commercial printing capabilities by affording us the opportunity to increase penetration in the gravure catalog and publications markets. It also opens the door to the substantial tabloid market.

These remarks demonstrate that the acquisition of the Helio-Klischograph fulfills, precisely and in the only way

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[8] We view with some suspicion this caution on the part of Western to announce the intended location of the Helio-Klischograph. Western representatives conceived of two possibilities: Kable, located at Mount Morris, Illinois, or at a proposed new film center to be built at a yet undetermined site somewhere in the mid-South. However, it was conceded that all cylinders, which weigh approximately 2000 pounds each, were for use exclusively on Kable's presses, that time is a critical factor in the performance of rotogravure preparatory work, and that in the correction process, which is a part of this work, it might be necessary to move cylinders several times between Kable's press area, where the proofing is done, and the cylinder-producing area, where corrections are made. Kable was the logical choice and that choice was ultimately announced.

possible, Western's business objectives as previously determined and set forth in its 1974 third quarter report.[9]

Thereafter, during the week of September 26, 1977, union pickets noted major construction activity within Kable's cylinder-engraving area. On September 28, Kable announced that it had been selected by Western to operate the Helio-Klischograph, which was scheduled to reach the Kable plant in October for installation.

Based on the above facts, we conclude, contrary to Kable's assertion, that at no time relevant herein did Kable intend to abandon permanently its rotogravure preparatory operations. Kable's substantial lack of candor in this regard, as evidenced both by its continued insistence on January 11, 1977, that it had done so at a time during which we can reasonably infer that its representatives were actively investigating the advisability of obtaining a Helio-Klischograph and, secondly, by delaying the announcement that Kable, the only plausible operator, had been "selected" for that purpose, leads us to conclude otherwise. We also note that this cylinder-engraving system is admittedly the only known means by which cylinder capacity can match Kable's anticipated press capacity, which was in fact planned prior to the company's first suggestion that it would permanently abandon the rotogravure preparatory portion of its business. Indeed, after examining all the evidence pertaining to the acquisition of the Helio-Klischograph in the light of Western's admitted long-term business objectives, as reported in 1974, we conclude that Kable intended at all times herein relevant to continue performing rotogravure preparatory work as the only means by which to achieve those business objectives to which it was unalterably bound.[10]

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[9] See fn. 4, *supra*.

[10] It would indeed be the unusual case in which the intent of an adverse party could be proven by direct evidence. Intent is subjective and in many cases can be proven only by the use of circumstan-

In these circumstances and at this stage of the instant proceeding, we deem it inequitable and unjust to permit Kable to use the very evidence it withheld for so long to disenfranchise the striking employees, by asserting that its new cylinder-engraving system extinguishes any reasonable expectancy of future employment on the part of those employees.[11]

Moreover, even if we were to have found that Kable permanently discontinued the production of rotogravure cylinders, as it had announced, we would not reach a different result. In this respect Kable contends, as previously mentioned, that, as a result of its decision to depend on outside suppliers to furnish such cylinders as are required, the jobs of the 113 striking employees were permanently abolished and, therefore, those employees are not eligible to vote in any election herein directed. We disagree.

Concededly, where the jobs of economic strikers have been eliminated for economic reasons, those strikers may forfeit their status as employees for voting purposes under Section 9 (c) (3) of the Act.[12]. However, in our view, the economic justification warranting such forfeiture cannot be predicated wholly on considerations flowing from the strike itself. In this case, it is clear that Kable evidenced no intention to abolish its rotogravure preparatory operations prior to the onset of the strike. Indeed, the labor dispute between Kable and the Union, which precipitated the strike, arose over the terms and conditions of employment applicable to individuals engaged

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cial evidence. Furthermore, in analyzing the evidence, the Board is free to draw any reasonable inference. See, e.g., *N.L.R.B.* v. *Melrose Processing Co.*, 351 F.2d 693, 698 (C.A. 8, 1965).

[11] Board consideration of this case was delayed for almost 1 year pending resolution of blocking charges in a number of related unfair labor practice cases which arose, in part, as a result of the events described above. We were administratively advised on September 28, 1978, that no charges remain as a bar to our Decision herein.

[12] See *Gulf States Paper Corporation*, 219 NLRB 806 (1975).

in that very work. Only after the strike proved effective, did Kable seek to establish alliances with front-end shops, first indirectly, and later, directly, in order to preserve the integrity and the traditional form of its contracts with customers and to avoid the economic impact of the strike. Such economic considerations, which were generated by the effectiveness of the strike itself, are insufficient, in our view, to justify disenfranchising strikers who are otherwise eligible to vote in a unit which continues to perform much of the work manifestly within its jurisdiction.

Based on the foregoing, we are of the opinion that the approximately 113 economic strikers in this case remain employees for the purpose of voting in the election we shall direct.

II

Kable also contends that the six individuals currently performing inspection and maintenance work on its cylinders and the cylinder scheduler are entitled to vote in any election herein directed. The Union, on the other hand, asserts that they are not. The Union would exclude cylinder maintenance operatives Webber, Hildebrandt, and Marshall as temporary employees. The record in this respect reveals that Webber and Hildebrandt were reassigned as cylinder maintenance operatives by Kable in January 1975. According to Webber, there was no discussion concerning the permanency of the transfer. Hildebrandt, on the other hand, was advised that his assignment as a cylinder maintenance operative was temporary. Marshall, a janitorial foreman who had no prior rotogravure preparatory experience, merely "assumed" that his reassignment as a cylinder maintenance operative in September 1974 was temporary. All three individuals have, since their respective assignments, been continuously employed as operatives, performing duties admittedly within the work jurisdiction of the unit represented by the Union and herein found appropriate. Further, there is no indication of any impending change in the work assignments of these individuals.

The Board has held that replacements for economic strikers are presumed to be permanent employees and eligible to vote unless the party challenging their eligibility status establishes by affirmative objective evidence that the replacements were employed on a temporary basis.[13] In our view, the foregoing facts do not rebut that presumption. Accordingly, we find that Webber, Hildebrandt, and Marshall are permanent employees who are eligible to vote in the election herein directed.

The Union also contends that quality control engineers Incontro and Kaville should be excluded from the unit as managerial or professional employees. These individuals inspect and mark up proofs; perform the necessary maintenance work on the corrective materials that have been applied to the cylinder surfaces by the suppliers, including lacquering, dallicking, rubbing, and, occasionally, staging and reetching. They also assist in the handling and moving of cylinders and in chroming and dechroming. Like the cylinder maintenance operatives, quality control engineers are salaried. However, unlike the operatives, they are treated as exempt from the overtime provisions of the Fair Labor Standards Act, receive a higher rate of pay, are paid biweekly rather than weekly, and receive more liberal vacation benefits. This distinction, the Union contends, renders quality control engineers ineligible to vote in any unit election. We disagree.

Section 2 (12) (a) of the Act defines professional employees as those whose work is predominantly intellectual and varied, involves the exercise of discretion and judgment, cannot be standardized in the output produced or the result accomplished, and requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning. It is clear from the foregoing that the work performed by Incontro and Kaville does not fall within this definition. Neither do these individuals formulate or

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[13] *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962).

effectuate management policies by expressing and making operative the decisions of their employer; nor do they have discretion in the performance of their jobs, independent of their employer's established policy, thus excluding them from the unit as managerial employees.[14] Accordingly, we shall allow both Incontro and Kaville to vote in the election herein directed.

The Union also asserts that McKeone, another quality control engineer, should be excluded from the unit as a professional employee. Among other things, McKeone assists in cylinder repair and correction, proof markup, and in the inspection of offset plates and negatives. However, his principal responsibility involves the testing and analysis of chemical solutions, using a standard analytical chemical procedure. He alone is authorized to perform such tests. Although McKeone has a baccalaureate degree in chemistry and has taken postgraduate courses in analytical chemistry, it does not appear that this educational background is a prerequisite to performing such work. Indeed, McKeone testified that "technicians in laboratories all over the country do these routine tests" and that others at Kable could be trained to perform the work in question. Further, it is uncontested that prior to the strike, the individuals who performed these tests were unit employees represented by the Union. In these circumstances, we find that, although McKeone is paid approximately one-third more than the other quality control engineers for the performance of work which concededly requires a greater degree of knowledge and skill, he is not a professional employee and thus disqualified from voting in the election.

The Union also asserts that Hollinger, the scheduler, should

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[14] *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974); *Eastern Camera and Photo Corp.*, 140 NLRB 569 (1963); *Palace Laundry Dry Cleaning Corporation*, 75 NLRB 320 (1947). Cf. *Sutter Community Hospitals of Sacramento, Inc.*, 227 NLRB 181, 193 (1976).

be excluded from the unit. Hollinger coordinates the movement of cylinders and the activities of the department with the pressroom, the outside suppliers of rotogravure preparatory services, and the cylinder makers. Occasionally, during peak periods, he may assist in the boxing, unloading, and moving of cylinders, which is concededly unit work. The scheduling functions performed by Hollinger are not included within the work jurisdiction of the historical unit which the parties stipulate to be appropriate, and which we so find, nor were those functions previously undertaken by any member of the aforesaid unit. In these circumstances, we agree that Hollinger should be excluded from the unit.

Accordingly, in view of the foregoing, we shall direct an election by secret ballot in the following unit of employees, which we find to be appropriate for the purposes of collective bargaining within the meaning of the Act:

> All employees performing any of the following work: all work, processes, operations and productions directly related to lithography, offset (including dry or wet), photoengraving, intaglio, and gravure methods of printing (excluding production presswork) employed by the Employer at its plant located at 404 N. Wesley Avenue, Mt. Morris, Illinois; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 33 shall direct and supervise the election, subject to the National Labor Relations Board Rules, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or

temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Also eligible are the approximately 113 employees here involved who have been engaged in an economic strike which commenced more than 12 months prior to the election date and who retained their status as such during the eligibility period. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[15] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Local 91—P, Graphic Arts International Union, AFL-CIO.

Dated, Washington, D.C. September 29, 1978

John H. Fanning, *Chairman*
John A. Penello, *Member*
National Labor Relations Board

(seal)

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[15] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 33 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make this list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

MEMBER MURPHY, dissenting:

Once again I decline to take the path followed by my colleagues which, as I have long feared, has now led inexorably to a result totally unsupportable by fact, law, or reason.

I disagree with my colleagues' assessment of recent events as proving that Kable never intended to abandon permanently its rotograure preparatory operations. Indeed, the evidence demonstrates that management's recent decision to institute the operational changes here in question was made in response to changing circumstances, both internal and external, and only after Kable had adhered to its initial decision to subcontract permanently rotogravure preparatory work for nearly 2-½ years. There is no evidence tending to show that when the company announced its initial decision in July 1974, it did so falsely or in bad faith.

My colleagues make much of what they infer to be Kable's lack of candor in January 1977, when funding was first requested for the purchase of the Helio-Klischograph. By thus building inference upon inference, they impute to Kable a hidden motive behind its initial announcement and conclude that a decision to abandon permanently the work in question had never taken place. I do not agree with that conclusion which proceeds on the erroneous notion that once a business decision is reached it must move along an unalterable course without regard to changing circumstances or, otherwise, become suspect.

Moreover, I cannot, with them, countenance the perpetuation of a phantom unit of employees and subvert the Board's processes by holding an election among individuals who, having struck their Employer more than four years ago, have long since been lawfully advised that the services they withheld were no longer needed, as those services had been permanently and irrevocably subcontracted to other firms willing to undertake the work. As I stated in an earlier dissent:

> The labor dispute between Kable and employees represented by Local 91—P effectively ran its course

> when Kable succumbed to the economic pressures caused by the strike which followed a clash of equally implacable negotiating objectives. Kable capitulated when paralysis of an integral part of its production process threatened the Company's very existence as an economic entity. Not all capitulations end in a realization of the opponent's objectives. Here, Kable's only feasible course of action was to discontinue rotogravure preparatory operations, subcontract that work to others, and integrate the work thus performed into its remaining printing operations. There is no allegation that the decision to subcontract was unlawful. Indeed, the Administrative Law Judge specifically found that Kable's decision to subcontract was made in good faith based upon legitimate business considerations and not as a bargaining stratagem to impose its will in the dispute with employees. Following Kable's decision, the individuals represented by the Union no longer had a reasonable expectancy of doing work which was, in fact, no longer done by the Company.[16]

This, in my opinion, terminated the "strikers' " interest in the unit here in question. The labor dispute thus developed into something far different from what it had been earlier when Kable, reacting immediately to the strike, made arrangements with allies for the continuation of the struck work through its customers, thereby *temporarily displacing* members of the striking unit. Indeed, I joined with my colleagues and found

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[16] *Graphic Arts International Union, AFL-CIO; and Local # 277, Graphic Arts International Union, AFL-CIO (S & M Rotogravure Service, Inc.)*, 222 NLRB 280, 283, remanded by unpublished Order *sub nom. Kable Printing Company* v. *N.L.R.B.*, Case 76—1038 (C.A. 7, 1976), supplemental Decision of the Board, 225 NLRB 1253 (1976), then Chairman Murphy dissenting, affd. 540 F.2d 1304 (C.A. 7, 1976).

alliances in those cases.[17] It is, however, in the present circumstances, a mockery to say that the economic strikers involved had not been permanently replaced by the employees of those subcontractors who have since entered into *bona fide* transactions with Kable. My colleagues' reliance upon *Gulf States Paper Corporation*[18] is therefore misplaced. In that case the Board held that unreplaced economic strikers were entitled to vote in an election to be held more than 12 months after commencement of the strike as there was no showing that their jobs were *permanently* eliminated or abolished. In asserting their ineligibility, the employer merely argued that because of economic conditions, it would have been forced to lay off some of its employees due to a decrease in customer orders. The Board rejected the notion that mere curtailment of production due to economic conditions, or perhaps to the effectiveness of a strike, can be grounds for disenfranchising otherwise eligible voters.[19] I wholly subscribe to this view. But this case is patently distinguishable. It does *not* involve curtailed production, but rather, at the time herein relevant, a total and permanent discontinuation of an operation heretofore performed by an employer. A different rule should apply, and, indeed, the Board has fashioned and applied such a rule in the past.

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[17] *Mount Morris Graphic Arts International Union Local No. 91—P (G.A.I.U.) (Blackhawk Engraving Co.)*, 219 NLRB 1030 (1975), affd. 540 F.2d 1296 (C.A. 7, 1976). See also *Graphic Arts International Union (G.A.I.U.) Local No. 277; and Graphic Arts International Union, AFL-CIO (S & M Rotogravure Services, Inc.)*, 219 NLRB 1053 (1975), and *Local No. 245, Graphic Arts International Union, AFL-CIO (Graphicscans Corporation)*, 220 NLRB 407 (1975), both cases affd. *sub nom. Kable Printing Company* v. *N.L.R.B.*, 540 F.2d 1304 (C.A. 7, 1976).

[18] 219 NLRB 806 (1975).

[19] See also *Globe Molded Plastics Company, Inc.*, 200 NLRB 377 (1972).

In *Meridian Plastics, Inc.*,[20] the Board held that economic strikers who were not recalled to work when their jobs were eliminated by the sale or lease of equipment and the subcontracting of certain operations after the strike started, were ineligible to vote in the election therein directed. My colleagues point to no case where, in similar circumstances, a contrary result obtained, and none is likely to be found.[21] For the rule itself is based on reason, as can be seen from the anomalous result obtained herein, where the ghosts of a multitude who have remained outside the employment relationship for more than four years, and are likely to so remain, are allowed to determine the mode of industrial life for the few who live within it. For these reasons, I must dissent.

Dated, Washington, D.C. September 29, 1978

Betty Southard Murphy, *Member*
NATIONAL LABOR RELATIONS
BOARD

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[20] 108 NLRB 203 (1954).

[21] Intervening amendments to the National Labor Relations Act, affecting voter eligibility, warrant no departure from the rule applied in *Meridian*. Indeed, following enactment of The Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86—257, 86th Congress), the Board cited *Meridian* favorably, evidencing the continued viability of the holding therein. See *W. Wilton Wood, Inc.*, 127 NLRB 1675 (1960).

APPENDIX B

STATUTES INVOLVED

29 U.S.C. §159 (c) (3)

No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike . . . .

29 U.S.C. §160 (e)

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . . The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .

29 U.S.C. §160 (f)

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.